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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 195

MARTIN G. TAUB, JOSEPH B. WOHLMAN, ABNER B. TAUB, AND CHARLES HOFFMAN, OF JERSEY CITY, NEW JERSEY, PETITIONERS

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 82–89) is not yet reported.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered June 6, 1945 (R. 90). The petition for a writ of certiorari was

filed July 3, 1945. Jurisdiction of this court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, 50 U. S. C. App., Supp. IV, Sec. 901, as amended by the Stabilization Extension Act of 1944, Public Law 383, 78th Cong., 2d Sess., and by the Act of June 30, 1945, Public Law 108, 79th Cong., 1st Sess., (herein sometimes termed "the Act"), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. Sec. 347).

QUESTIONS PRESENTED

1. Whether Section 204 (e) of the Emergency Price Control Act prior to amendment by the Act of June 30, 1945 authorized the filing of a complaint with the United States Emergency Court of Appeals by a defendant in a prosecution brought pursuant to Section 37 of the Criminal Code.

2. Whether the Twenty-first Amendment to the United States Constitution precludes the establishment under the Emergency Price Control Act of maximum prices for sales of alcoholic beverages.

3. Whether the establishment of maximum prices for sales of alcoholic beverages is in contravention of the Emergency Price Control Act on the ground that such maximum prices do not effectuate the purposes of the Act.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act and Section 37 of the Criminal Code appear in the Appendix, *infra*, pp. 13–26. The maximum price regulations involved in this proceeding are printed in the Federal Register (7 F. R. 6006; 8 F. R. 11161).

STATEMENT

The petitioners were indicted in the United States District Court for the District of New Jersey for conspiracy to sell alcoholic beverages at prices in excess of the maximum prices established under the Emergency Price Control Act, in violation of Section 37 of the Criminal Code (18 U. S. C., Sec. 88). After arraignment the petitioners, invoking Section 204 (e) of the Emergency Price Control Act, filed with the district court an application for leave to file a complaint in the United States Emergency Court of Appeals setting forth objections to the validity of the maximum prices in question (R. 4–12). The district court granted the application and stayed further proceedings in the criminal prosecution until final determination of the proceeding in the Emergency Court of Appeals (R. 13–15). Petitioners then filed a complaint with the Emergency Court of Appeals, which asserted that the Twenty-first Amendment to the United States Constitution barred Congress from establishing maximum

prices for alcoholic beverages, and that price control for alcoholic beverages violated the terms of the Emergency Price Control Act on the ground that it served none of the purposes of that Act (R. 1–3).[1]

Respondent moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted (R. 16–23) and in addition directed attention to the fact that Section 204 (e) of the Act authorized the filing of such a complaint only by a defendant in a "proceeding, brought pursuant to Section 205" of the Emergency Price Control Act (R. 24). The Emergency Court of Appeals dismissed the complaint (R. 90), holding that it was without jurisdiction and that in any event the complaint was without merit. (R. 82–88.) One judge dissented on the first issue. (R. 88–89.) The court held that the Act did not authorize the filing of a complaint by a defendant in a prosecution brought pursuant to Section 37 of the Criminal Code. The court also considered petitioners' objections to the establishment of maximum prices for alcoholic beverages and held that the complaint failed to state a cause of action (R. 82–89).

Thereafter, by the Act of June 30, 1945, Congress amended Section 204 (e) of the Emergency Price Control Act to authorize the filing of a com-

[1] The complaint also set forth other objections which petitioners have not renewed in the petition or brief.

plaint with the Emergency Court of Appeals by a defendant in a "proceeding, brought pursuant to section 205 *of this Act or section 37 of the Criminal Code.*" [Italicized provision added by amendment.]

ARGUMENT

Petitioners present the question whether Section 204 (e) of the Emergency Price Control Act, prior to amendment, authorized the filing of a complaint with the Emergency Court of Appeals by a defendant in a prosecution under Section 37 of the Criminal Code (Pet. 4). As the opinion below points out, the language of the statute was precise and unequivocal in limiting the right to file such a complaint to a defendant in a "proceeding, brought pursuant to section 205" of the Emergency Price Control Act. Section 205 of the Act prescribes certain procedures for requiring compliance with and punishing violation of maximum price regulations. Petitioners do not deny that the prosecution in the district court was brought pursuant to Section 37 of the Criminal Code, rather than pursuant to Section 205 of the Emergency Price Control Act.[2] Although the

[2] One judge below, dissenting in part, concluded that the indictment would have supported a conviction for violation of the regulations issued by the Price Administrator and that for this reason the proceeding was brought pursuant to Section 205 of the Emergency Price Control Act (R. 88–89). The majority of the Court construed the indictment as authorizing prosecution only under Section 37 of the Crim-

Emergency Court of Appeals recognized that to grant a defendant in a conspiracy prosecution the authority to file a complaint with the Emergency Court of Appeals would have been consistent with the general intent of the Congress, the court quite correctly concluded that in view of the unequivocal language of the statute this procedure had not been authorized.

The correctness of the court's construction of the Act has been confirmed by the subsequent action of Congress. Thus, by Section 6 of the Act of June 30, 1945, Congress amended Section 204 (e) of the Emergency Price Control Act to authorize the filing of a complaint with the Emergency Court of Appeals by a defendant in a proceeding "brought pursuant to section 205 of this Act *or section 37 of the Criminal Code.*" Both the language of this amendment and its legislative history show that Congress recognized that it effected a distinct change in the statute. This amendment, which originated in the course of the conference between representatives of the

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inal Code, and pointed to the sharp distinction which has been maintained between prosecution under the Criminal Code for conspiracy to commit an offense and prosecution for the commission of the offense itself. *United States* v. *Rabinowich*, 238 U. S. 78; *United States* v. *Hirsch*, 100 U. S. 33; *United States* v. *Stevenson*, 215 U. S. 200; *United States* v. *McElvain*, 272 U. S. 633; *Braverman* v. *United States*, 317 U. S. 49. The indictment is not set forth in the record, but petitioners' pleadings support the conclusion of the majority of the court (R. 4, 7).

Senate and House, was explained by Senator Wagner, speaking for the Managers upon the part of the Senate, as follows (91 Cong. Rec., June 28, 1945, at 7063–4):

> Section 6 of the conference agreement amends subsection (e) of section 204 of the Emergency Price Control Act. This subsection now provides that in any enforcement proceeding brought pursuant to section 205 of the Price Control Act, the defendant may obtain leave to institute a special proceeding to test the validity of the regulation or order he is alleged to have violated, and also provides for a stay of the enforcement action during the pendency of the special proceeding testing the validity of such regulation or order. However, the subsection now applies only in the case of actions brought under section 205 where an actual violation of a regulation or order is alleged. It does not apply in cases where the action is brought under the general conspiracy statute, section 37 of the Criminal Code, and the offense charged is conspiring to violate a regulation or order issued under the Price Control Act.
>
> The effect of the present amendment is to extend the application of this subsection to prosecutions for conspiracy to violate price control regulations or orders, so that the defendants in such cases will have an opportunity to test the validity of the regulations or orders which they are

> charged with having conspired to violate, just as defendants in cases under section 205 are given an opportunity to test the validity of the regulations or orders which they are charged with actually having violated.[3]

At no point in the legislative history of the Act of June 30, 1945, is the suggestion made that the decision below incorrectly applied the terms of the statute. On the contrary, it is evident from the foregoing that Congress accepted the correctness of the court's construction of the existing statutory provisions.

This modification of the statute also deprives the decision below of any general significance which otherwise it might have possessed. No other case filed with the Emergency Court of Appeals has raised this issue. Certainly this case alone does not warrant review by this Court of the construction of Section 204 (e) of the Act as it stood prior to the Act of June 30, 1945. As is pointed out more fully in the following portion of this brief, petitioners' objections to the validity of the applicable maximum price regulations were

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[3] The Statement of the Managers on the part of the House, House Report No. 827, 79th Cong., 1st Sess, p. 8, is in part as follows: "Section 6 of the conference substitute makes the amendments in such subsection (e) which are necessary to give to persons prosecuted under section 37 of the Criminal Code, on account of alleged conspiracy to violate any such regulation or order, the rights provided by subsection (e) in the case of civil or criminal proceedings brought under section 205 of the Act."

fully considered on their merits by the Emergency Court of Appeals, and were found to be wholly without substance. But even if additional review of the merits of the petitioners' objections were appropriate, such review could be sought under the provisions of the statute.[4]

There is no conflict with *Old Monastery Co.* v. *United States,* 147 F. 2d 905 (C. C. A. 4) which calls for resolution. That decision affirmed a conviction for conspiracy to violate price regulations in the sale of intoxicating liquors, and rejected the same contentions going to the validity of such a prosecution that petitioner argues collaterally in the present case (Pet. 8–11).[5] The court there, in holding further that the price regulations could not be attacked in a district court, referred to the availability of a remedy under Section 204 (e); but the reference was not a holding and it does

[4] Section 204 (e) of the Act provides that a defendant in a criminal proceeding may apply for leave to file a complaint with the Emergency Court of Appeals either within 30 days after arraignment or within 5 days after judgment. The application which led to the complaint below was filed after arraignment and before judgment, and further trial of the prosecution was stayed pending determination of the proceedings in the Emergency Court (R. 15). If further review of the merits of the case were appropriate, petitioners would be entitled after judgment to file with the district court an application under the provisions of Section 204 (e) of the Act, as amended by the Act of June 30, 1945.

[5] Indeed, the argument in the petition is directed mainly to the asserted lack of due process in the prosecution and to the contention that it could not be founded on Section 37 of the Criminal Code—issues which the Emergency Court could in no event decide.

not appear that the court in that dictum considered the problem of construction decided by the court below. Moreover, as already indicated, the problem has been obviated for the future by Congress.

2. This case does not warrant review by this Court for the further reason that, as shown by the opinion of the Emergency Court of Appeals (R. 85–88), petitioners' objections to the regulations establishing maximum prices for alcoholic beverages were considered and properly held to be without substance. There is plainly no merit in the contention that the Twenty-first Amendment bars Congress from establishing maximum prices for sales of intoxicating liquors. Petitioners have not suggested that the Federal price control program for liquor is in conflict with regulations prescribed by the State of New Jersey for sales of liquor, and apparently base their objection on the assumption that the Twenty-first Amendment reserves to the states exclusive power to regulate intoxicating liquors. This contention, however, has been emphatically rejected by this Court. *United States* v. *Frankfort Distilleries,* 324 U. S. 293; *Jameson & Company* v. *Morgenthau,* 307 U. S. 171. Moreover, attempts to invoke the Twenty-first Amendment as a bar to federal control of maximum prices for sales of intoxicating liquors have been uniformly rejected. *Jatros* v. *Bowles,* 143 F. (2d) 453 (C. C. A. 6); *Old Monastery Co.* v. *United States,* 147 F. (2d) 905 (C. C. A. 4).

The court below was likewise clearly correct in rejecting petitioners' contention that regulations establishing maximum prices for sales of intoxicating liquors are invalid under Section 2 (a) of the Emergency Price Control Act on the ground that such regulations do not effectuate the purposes of the Act.[6] As the court pointed out, the regulations fall squarely within the objective "to stabilize prices", listed at the outset of Section 1 (a) which states the purposes of the Act. Moreover, the Emergency Court of Appeals has consistently adhered to the view that no single commodity can be excepted from price control as a matter of law without threatening the stability of prices for other commodities. *Philadelphia Coke Company* v. *Bowles*, 139 F. 2d 349 (E. C. A.); *Lincoln Savings Bank of Brooklyn* v. *Brown*, 137 F. 2d 228 (E. C. A.). The considerations underlying this rule were thus stated in the opinion below (R. 87):

> We have declared it entirely realistic when inflationary pressure enters upon the stage as a major force affecting the public economy, to refuse to except the price of

[6] Section 2 (a) of the Act provides: "Whenever in the judgment of the Price Administrator * * * the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act."

> liquor or of any other single commodity from others and to refuse to treat any commodity as located in an economic vacuum removed from other human transactions on the ground that it constitutes no threat of an inflationary increase in prices. In achieving stabilization, the price of any and every commodity freely and openly dealt in is a factor affecting results. The omission of one or more articles, whatever their character, may upset the entire plan.

In sum, the question of jurisdiction which the petition seeks to present not only is no longer of general importance, but is not of further importance in this case itself, in view of the independent alternative ground of decision, dealing with the merits, which in no event would warrant review.

CONCLUSION

The case was rightly decided and presents no substantial question of general importance. The petition should be denied.

Respectfully submitted.

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JULY 1945.